Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1548

ANTHONY G. ALATERAS

Petitioner

versus

FLOYD J. HEPTING AND AMERICAN RADIO ASSOCIATION AFL-CIO

Respondent

PETITION FOR A WRIT OF CERTIORARI TO COURT OF APPEAL, FOURTH CIRCUIT STATE OF LOUISIANA

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO.

ANTHONY G. ALATERAS
Petitioner

v.

FLOYD J. HEPTING AND AMERICAN
RADIO ASSOCIATION AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO COURT OF APPEAL, FOURTH CIRCUIT, STATE OF LOUISIANA

The petitioner, Anthony G. Alateras, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals, Fourth Circuit, State of Louisiana rendered in these proceedings on January 12, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana, as yet unreported, declining to review, appears in the appendix hereto, *infra*, p. A- 11. The opinion of the Court of Appeal, Fourth Circuit, State of Louisiana is reported at 342 So 2d 247 (La. App. 1977), and appears in the appendix hereto, *infra*, pp. A- 6 - 10 . The judgment of the Civil District Court, for the Parish of Orleans, State of Louisiana, together with the reasons therefore, is unreported, and appears in the appendix hereto, *infra*, pp. A- 1.

JURISDICTION

The refusal of certiorari by the Supreme Court of Louisiana was entered on March 25, 1977. It is final. The federal question raised is indicated at pp. 3 - 5 , *infra*. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether the National Labor Relations Act, 29 U.S.C. § 151 et seq. forecloses a worker's tort claims against a union's agent by ousting the state court's jurisdiction over the unions internal affairs?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§158(b) (2)

"It shall be an unfair labor practice for a labor organization or its agents -

* * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated * * * * *".

Louisiana Civil Code of 1870:

Art. 2315

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

* * * * *"

STATEMENT OF THE CASE

Plaintiff, a member of the American Radio Association, sued the union and one of its officials for denial of one of his membership rights in the union. He alleged that he was employed upon a vessel (judicially admitted in defendants' answer); that he was temporarily layed off (also, judicially admitted in defendants' answer); and that he had a right under the union rules to be placed upon the Stand By List, which right was denied him through malice.

The defendants answered that plaintiff, as a member, was bound by the internal union rules, and that the union's reassignment of plaintiff's job to another member was in accordance with the union's internal assignment rules.

Prior to answer, the defendants filed a declinatory exception that the petition stated an unfair labor practice, and hence, the National Labor Relations Board had exclusive jurisdiction.

Plaintiff contends that the trial court took jurisdiction for there was a trial, witnesses were called, they testified, and there was an adjudication of the evidence dismissing his complaint upon grounds other then jurisdiction. The appellate court held that the trial court never passed upon the question of jurisdiction.

On the trial, contrary to the pleadings and over the objection of plaintiff, evidence was admitted to show that plaintiff was not employed on the vessel and that the union's assignment rules were not applicable.

The testimony put on by the defendants, which was adopted by plaintiff as a part of his case, showed that plaintiff lost $11,881.30 by being denied his membership right under the union's assignment rules, as loss of wages had his job not been reassigned.

The trial court held that plaintiff failed to carry the burden of proving that defendants had interferred with his employment for while he was entitled to continue his employment, under the union's assignment rules, he was not employed in the first place because he did not get the employment pursuant to the union's internal Constitution and By-Laws. That plaintiff's action in obtaining the employment made the union's assignment rules inapplicable.

On the sole ground that he had the right to rely upon the pleadings and had made timely objection to the introduction of evidence denying his employment and denying the applicability of the union's assignment rules, plaintiff appealed. The Court of Appeals, Fourth Circuit, never reached the question raised on plaintiff's appeal. It held that it had no jurisdiction over the subject matter, annulled the trial court's judgment, and maintained the defendants' jurisdictional exception.

REASON FOR GRANTING THE WRIT

1. The Decision Below Is Not In Accord With Applicable Decisions Of This Court, As They Do Not Oust State Court Jurisdiction Over Peripheral Matters

The petition in this case alleges a tort under LSA-CC Art. 2315 for malicious interference with petitioner's employment by the union's agent.

When a court holds that a grievance is arguably within the jurisdiction of the NLRB, it sends the individual employee to Washington, D.C., imposing a great hardship on him, especially where he is a lone individual not financed out of a lush treasury. For torts, this Court has held that the employee should be allowed to litigate in his home town tribunal and not require him to resort to an elusive remedy in distant and remote Washington, D.C., which takes money to reach. *Inter'l Ass'n of Machinists v. Gonzales*, 78 S. Ct. 923 (1958).

Under the Act, an employee has six months within which to file an unfair labor practice charge with the Regional Director and serve it upon the other party. If he does not file within six months, the claim is barred. 29 U.S.C. §160 (b).

The Regional Director has the power to hold that there has been no violation of the NLRA or that the evidence is insufficient to substantiate the charge. In which event, he tells the employee to withdraw the charge. 29 CFR§ 101.5. If the employee does not withdraw the charge, the Regional Director dismisses it. 29 CFR §101.6. Following dismissal, the employee has 10 days to appeal the decision to the Gen-

eral Counsel *id*. If the General Counsel refuses to issue an unfair labor practice complaint, the decision is apparently unreviewable. *General Driver, Etc. v. NLRB*, 179 F.2d 492 (10th Cir 1950)

There is not a trace of equity in this long-drawn remedy. If the employee gets the resources to exhaust the administrative remedy, he too is exhausted, and if the General Counsel refuses to act, then the employee is without remedy.

Fortunately, the sway of this Court's decisions is that a union agent's delicts upon an employee are merely peripheral and are not arguably within the jurisdiction of the NLRB. *International Union, Etc. v. Russell*, 78 S.Ct. 932 (1958), malicious interference with employment; *Linn v. United Plant Guard Wkrs. of Am.*, 86 S.Ct. 657 (1966), defamation.

If the malicious interference with employment centers itself on the relationship between the individual plaintiff and the union (i.e., membership rights) it is peripheral and the NLRB has no power to act. If the action is concerned with a member's employment rights it is arguably within the Act and state courts are preempted by the Board.

None of the cases relied upon by the court below are concerned with torts committed upon the employee. *Garner v. Teamsters*, 74 S.Ct. 161 (1953) was an action by trucker against union to enjoin picketing. *San Diego Bldg. Trades Council v. Garmon*, 79 S.Ct. 773 (1959) was an employer action against unions for injunction to restrain picketing. Plaintiff has no quarrel with these cases.

If a member is wrongfully expelled from the union and is seeking reinstatement because he can not get work in absence of membership *Amalgamated Asso. of S.E.R. & M.C. E. v. Lockridge*, 91 S.Ct. 1909 (1971) and not because of injury to his rights as a union member; the conduct of the union is arguably within the act and state courts are preempted. But *Lockridge* reaffirms this Court's holding in *Int'l Ass'n of Machinists v. Gonzales*, 78 S.Ct. 923 (1958).

The *Gonzales* decision turned on this Court's conclusion that the law suit was focused on internal union matters, i.e., on the relationship between the individual plaintiff and the union. This Court recognized that the Board had no power over internal union affairs, lacked power to have Gonzales restored his membership, and that state courts had power "to fill out this remedy" (*id* 925) by an award of consequential damages (wage loss, mental suffering). The Taft-Hartley Act, this Court stated, did not require mutilation of "the comprehensive relief of equity" (*id*).

On the other hand, if the member's employment rights rather then his membership rights are in dispute the union's conduct is arguably within. The plaintiff in *United Asso. of Jour. & App. v. Borden*, 83 S.Ct. 1423 (1963) went to Texas from Louisiana looking for work, but was unable to get a union referral from its Texas business agent and he did not get the job; a fact not present in the case at bar. As in *Borden*, the member in *Local 207, Bridge Workers v. Perko*, 83 S. Ct. 1429 (1963) was not attempting to secure any redress for loss of membership rights.

In the instant case, plaintiff alleged that he had a job, was temporarily layed off; that he had a right to be placed upon the Stand By List under the union assignment rules, and

that this right was denied. Even the defendants pleaded that the internal assignment rules were applicable to the case. The right maliciously denied petitioner, being internal, is one that only the state courts have power to remedy.

It is quite true that the collateral effect of the denial of the membership right resulted in plaintiff's loss of employment, but this does not oust a state court's jurisdiction over a union's tortious internal affairs for they are "not in themselves a matter within the Board's competence". *Gonzales, supra.* at 925.

The trial court correctly held that it had jurisdiction to consider the question of plaintiff's membership right to be placed upon the union's Stand By List.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal, Fourth Circuit, State of Louisiana.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 1977, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to C. Paul Barker, Esq., 837 Gravier Street, New Orleans, Louisiana, Counsel for the Respondents. I further certify that all parties required to be served have been served.

E. Howard McCaleb, III
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Counsel for Petitioner

APPENDIX A

JUDGMENT

STATE OF LOUISIANA
CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

NO. 538,032 DIVISION "J" DOCKET 4

ANTHONY G. ALATERAS
VS.
FLOYD J. K. HEPTING AND AMERICAN RADIO ASSOCIATION AFL-CIO

JUDGMENT

This cause having been heretofore heard and submitted to the Court for adjudication and the Court considering the law and the evidence and for the written reasons herein filed and made part of the record;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the defendant, Floyd J. K. Hepting and American Radio Association AFL-Cio, and against the plaintiff, Anthony G. Alateras, dismissing the said plaintiff's suit at his costs.

JUDGMENT READ, RENDERED AND SIGNED IN OPEN COURT JUNE 30th 1975

S/ George C. Connolly, Jr.
JUDGE

APPENDIX B

REASONS FOR JUDGMENT

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 538-032 DIVISION "J" DOCKET NO. 4

ANTHONY G. ALATERAS
VS.
FLOYD J. K. HEPTING AND AMERICAN RADIO ASSOCIATION AFL-CIO

FILED: Dy. Clerk

REASONS FOR JUDGMENT

Mr. Anthony G. Alateras, plaintiff, and a member in good standing of the American Radio Association AFL-CIO, received on February 12, 1972 an official permanent assignment as a radio officer to the S/S JAPAN BEAR.

The plaintiff received this assignment by virtue of being on top of the Standby List. He reported to work on February 12, 1972. He continued to work until February 14, 1972 when it is alleged that he was temporarily laid off from his employment. Thereafter, he was denied Stand-By status by Mr. Floyd J.K. Hepting, Port Agent for defendant Union.

Plaintiff alleged that Hepting's refusal to place him upon the Stand-By List removed him from his official work as-

signment and placed him at the bottom of the assignment list.

This action, it is alleged, was arbitrary, irrelevant and discriminatory and constituted interference with his employment. He prays for judgment accordingly.

Floyd J. K. Hepting and the American Radio Association AFL-CIO denied the allegations and alleged inter-alia that plaintiff's removal from the S/S JAPAN BEAR or temporary layoff by the company and the refusal of defendants to reassign plaintiff was in accordance with the National Assignment Rules binding on plaintiff and pursuant to the Constitution and By-Laws of the defendant Union.

After reviewing the pleadings, testimony, the law and the evidence, the court is of the opinion and the evidence preponderates in favor of the defendant's position, since the evidence fails to sustain plaintiff's allegations that the Union and its port agent refused to refer him for employment or interfered with his employment.

The American Radio Association AFL-CIO National Assignment Rule 9(a) recites as follows:

> "The Union Employment Office shall maintain a list of Radio Officers who have temporarily left their assignment for reasons of sickness, vacation, layoff or for other valid reasons. This list shall be known as the Standby List."

Admittedly, plaintiff was issued an official permanent assignment on S/S JAPAN BEAR. The record will reflect

that he was laid off on February 14, 1972. Pursuant to Rule 9(a) of the National Assignment, he was entitled to be placed on STANDBY.

The record will reflect, however, that the plaintiff procured his assignment under a condition which did not comply with the Constitution and By-Laws of the defendant Union or within the meaning and intent of the aforesaid rule.

At the time of plaintiff's assignment, the construction of the S/S JAPAN BEAR had not as yet been completed. The vessel was owned by the shipyard and had not been delivered to the Pacific Far East Steamship Company, its new owner.

Prior to completion of the vessel, a radio officer was requested. The plaintiff recived the assignment. The company hired the plaintiff to perform tests on radio equipment. He was thereafter to be laid off during the sea trial or until delivery. The plaintiff knew of these arrangements before he took the assignment and consented thereto. The assignment, purportedly permanent in nature, was in truth and in fact a temporary assignment and not made pursuant to the Constitution and By-Laws of the defendant Union.

Plaintiff's action and employment constituted, in the Court's opinion, a circumvention of the Union's Constitution and By-Laws, and made inapplicable the provisions of Rule 9(a) of the National Assignment as it pertains to plaintiff's request to be placed on the STANDBY LIST.

Judgment has been rendered accordingly.

s/ George C. Connolly, Jr.
JUDGE

New Orleans, La.
June 30th, 1975

APPENDIX C

JUDGMENT ANNULLED - EXCEPTION MAINTAINED

ANTHONY G. ALATERAS No. 7780

V. COURT OF APPEAL

FLOYD J. K. HEPTING AND FOURTH CIRCUIT
AMERICAN RADIO ASSOCIATION
AFL-CIO STATE OF LOUISIANA

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, DIVISION "J", No. 538-032, HONORABLE GEORGE C. CONNOLLY, JR., JUDGE

: : :

EDWARD J. STOULIG
JUDGE

JAN 12 1977

(Court composed of Judges William V. Redmann, Edward J. Stoulig and Ernest N. Morial)

E. HOWARD McCALEB, III
for plaintiff-appellant.

DODD, BARKER, BOUDREAUX, LAMY & GARDNER
C. PAUL BARKER
for defendants-appellees

JUDGMENT ANNULLED; EXCEPTION MAINTAINED.

APPENDIX D

OPINION OF COURT OF APPEAL

Plaintiff, Anthony G. Alateras, instituted this suit for $750,000 damages and lost wages allegedly resulting from an unfair and discriminatory labor practice by defendant, Floyd J. K. Hepting, a New Orleans based official of defendant, the American Radio Association AFL-CIO, in refusing to place plaintiff's name on a "standby" list for employment aboard ship as a radio officer.

Defendants filed a declinatory exception to the court's jurisdiction, asserting that a complaint stemming from an alleged unfair labor practice is within the exclusive jurisdiction of the National Labor Relations Board under 29 U.S.C. § 151 et seq. By stipulation the exception was referred to the merits but was never passed upon by the trial court. After a trial on the merits, plaintiff's suit was dismissed. He has appealed.

[1] Although defendant has neither appealed nor answered the appeal, we notice sua sponte our lack of jurisdiction because it is inappropriate for any court to adjudicate merits if the subject matter may not properly be brought before it.

[2] Alateras alleges Hepting, a union representative, refused to place plaintiff's name on a stand-by list for future employment as the union rules require. The gravamen of his complaint is that defendant violated 29 U.S.C. § 158(b)(2), which states:

"It shall be an unfair labor practice for a labor organization or its agents –

* * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *".

29 U.S.C. § 160 provides for administrative and judicial review of any complaint based on an alleged violation of § 158 before the National Labor Relations Board. As this section has been interpreted by the United States Supreme Court, the Board's jurisdiction in the unfair labor practice area is exclusive.

The concept of federal preemption in labor relations has its genesis in the interstate commerce and federal supremacy clauses of the United States Constitution. (Art. I, § 8 and Art. VI.) In *Amalgamated Ass'n of St., E.R. & M. C. Emp. v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed. 2d 473 (1971), the Supreme Court discussed the need for uniformity in adjudicating labor disputes and the areas where federal preemption would be necessary to achieve this result. After relating the trial and error approaches taken by the federal judiciary to delineate between federal and state jurisdiction in labor matters, the court cited with approval this first workable formulation that emerged in *San Diego Building Trades Council, Etc. v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 779, 3 L.Ed. 2d 775 (1959), viz:

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.

"At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board. See, e.g., *Garner v. Teamsters, etc. Union*, 346 U.S. 485, especially at pages 489-491, 74 S.Ct. 161, at pages 165-166, 98 L.Ed. 228; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546."

In *Local 100 of United Ass'n of Jour. & App. v. Borden*, 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed. 2d 638 (1963) --

factually analogous to this case -- the Court followed Garmon and held the state court did not have jurisdiction.[1]

In *Local No. 207, Int. Ass'n of Bridge, Etc. v. Perko*, 373 U.S. 701, 83 S.Ct. 1429, 10 L.Ed. 2d 646 (1963), the Supreme Court held that state jurisdiction was preempted even where the object of the suit was damages allegedly incurred as the result of an unfair labor practice.

In the instant case plaintiff first filed a complaint with the National Labor Relations Board based on the same incident upon which he premises this suit. This action was filed while the charges were pending before the administrative review agency. Ultimately his Board complaint was dismissed as meritless and appealed unsuccessfully through several administrative levels. In this case Alateras' complaint was investigated and the National Labor Relations Board found the evidence insufficient to warrant further proceedings. But even if no complaint had been filed with the Board, under the jurisprudence summarized the state court has no jurisdiction to entertain this suit and the declinatory exception should have been maintained.

For the reasons assigned, the judgment appealed from is annulled and it is now ordered that this suit be dismissed for lack of jurisdiction. Appellant is to pay all costs.

JUDGMENT ANNULLED; EXCEPTION MAINTAINED

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1. H.N. Borden, as a member of a plumbers' union, complained a union official arbitrari', withheld a referral he needed before he could be hired on a bank co struction job.

APPENDIX E

ORDER REFUSING WRIT

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

ANTHONY G. ALATERAS March 25, 1977

V.

FLOYD J. HEPTING AND AMERICAN
RADIO ASSOCIATION AFL-CIO NO. 59,429

. . . . . .

In re: Anthony G. Alateras applying for certiorari, or writ of review, to the Court of Appeal, Fourth Circuit Parish of Orleans

. . . . . .

Writ refused. There is no error of law in the judgment of the court of appeal.

S/ JWS
S/ FWS
S/ AT JR
S/ JAD
S/ WFM

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
March 25, 1977

/s/ Phil Trice
Deputy Clerk

Supreme Court, U. S.
FILED
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ANTHONY G. ALATERAS

Petitioner

versus

FLOYD J. HEPTING AND AMERICAN RADIO ASSOCIATION AFL-CIO

Respondent

BRIEF IN OPPOSITION OF RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES
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BRIEF IN OPPOSITION OF RESPONDENT

QUESTION PRESENTED

Whether Plaintiff's claim that Defendants caused him to be refused employment is sufficiently interwoven with the administration of federal labor policy to allow the State Court's determination that the claim was subject to the exclusive jurisdiction of the National Labor Relations Board over alleged unfair labor practices.

COUNTER STATEMENT OF THE CASE

Plaintiff's original petition, (Appendix A) sought damages on the grounds that Defendants had caused Pacific Far East Lines to refuse to employ Plaintiff by placing him on an improper hiring list. The crux of the claim was that because of an alleged improper application of union rules governing the relative status of union members waiting for employment, Plaintiff lost certain wages that were said to amount to $700,000.00.

At roughly the same time that suit was initiated, charges were filed with the National Labor Relations Board claiming that Defendants' action constituted an unfair labor practice. The Regional Director for the Fifteenth Region refused to issue a complaint since his investigation did not disclose evidence that the Labor Management Relations Act, (29 USC 151), has been violated. Upon appeal, the General Counsel for the NLRB affirmed that decision on the basis that the action taken with regard to Plaintiff resulted from a belief that he was attempting to circumvent hiring hall procedures and thus did not result from any unlawful intent. (Appendix B and C)

As set forth in the opinions reproduced in the Petition for a Writ of Certiorari, the State Courts first concluded that there was no merit to Plaintiff's claim at State law and that judgment should be rendered in favor of Defendants and then on an appeal that there was no jurisdiction to entertain this suit.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 157. Right of employees as to organization, collective bargaining, etc.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right

may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

§ 158(b) (1) (A)

"It shall be an unfair labor practice for a labor organization or its agents -

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;"

ARGUMENT

Rule 19 of the Rules of the Supreme Court indicates that a writ of certiorari will issue where a state court has decided a substantial federal question in a way probably not in accord with decision of this Court. Here that would appear to mean that a writ should issue if the Louisiana Court of Appeals improperly applied the test based in *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959) that activity arguably subject to § 7 or § 8 of the National Labor Relations Act (NLRA), 29 USC 151 et seq. should be exclusively handled by the NLRB. To grant writs it would be necessary to find that the theory rooted in *Association of Machinists v. Gonzales*, 356 U.S. 617 (1958) should apply and that there should be no preemption since the activity in this case does not fall within the scope of regulation of labor affairs undertaken by federal law.

At the outset the instant case can be distinguished from holdings like *Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) and its antecedents that deal with preemption in areas where Congress meant an activity to be unregulated. The claim of Mr. Alateras does not relate to the area of economic weapons that are available in the labor context and are neither protected nor prohibited by the law. Rather, his claim falls within the area where the National Labor Relations Board (NLRB) has exclusive jurisdiction and is not of the type of activity where no court or agency could take jurisdiction.

The *Garmon* rule as restated in *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971) is based upon the rationale that when Congress acted in the labor relations area, it intended to fundamentally restructure the processes through which the federal labor policy is to be effectuated. Administration of the new system was entrusted to the NLRB to assure uniformity in the rules of law, the remedies and the administration of the federal labor policy. The common law courts were seen by Congress as incapable of providing "an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good." (*Lockridge*, supra, 286)

To avoid potential conflict in the administration of labor policy this Court has evolved the doctrine that the jurisdiction of state and federal courts is preempted by the NLRB when activity arguably falls within § 7 or § 8 of the National Labor Relations Act (NLRA), the substantive areas of NLRB administration.

Lockridge held that this preemption precluded state litiga-

tion whether the state was attempting to act through a law specifically directed at the labor context or through a law of general application such as Article 2315, the general tort article in the Louisiana Civil Code. State action was permitted in the labor area only when such action was peripheral to the concerns of the NLRA and *Garmon* was read in the *Lockridge* decision as limiting *Gonzales* to permit state action only in this peripheral area.

Three cases give guidance as to what sort of activity lies in this peripheral area, the first to be dealt with being *Local 100, Plumbers v. Borden*, 373 U.S. 690 (1963). In that case the peripheral area delineated in *Gonzales* was held to be purely internal union concerns not having to do with matters of employment. The NLRB was recognized as being without power to restore a man to union membership when it was due to internal actions of the union that were unrelated to employment. Mr. Borden's claim dealt with alleged improper administration of a hiring hall. The refusal of the union to refer him along with the resulting inability to obtain employment were found to be arguable violations of § 8(b) (1) (A) and § 8(b) (2) of the NLRA. The crux of his claim involved the union causing an employer to discriminate against Borden and coercing him in the exercise of his protected right to refrain from observing internal rules. Because of the complexities in the administration of hiring halls and the fact that the conduct complained of was arguably within the mainstream of the LMRA this court held jurisdiction over this conduct was vested exclusively within the NLRB.

Local 207, Bridge Workers v. Perko, 373 U.S. 701 (1963) involved a similar situation where the crux of the claim involved alleged interference with the plaintiff's existing and future employment relationships by the union. Plaintiff had

sought to sue the union on a tort theory because the union had supposedly caused his discharge. Here again the conduct of the union, if proven, would arguably constitute an unfair labor practice and proven, would arguably constitute an unfair labor practice and therefore the state court was required to yield to the jurisdiction of the NLRB.

Factually, the *Borden* case is quite similar to the instant litigation since Plaintiff's claim is based upon his assertion that the union improperly applied the hiring hall rules by placing his name on the Active Beach List rather than the Standby List. His claim is not a purely internal matter since the action of the union affected Plaintiff's employment by Pacific Far East Line. If the union's action was improper it would be a violation of Section 8(b)(2) of the NLRA which prohibits a union from causing an employer to discriminate against an employee in violation of Section 8(a)(3). The action could also be found to be a violation of Section 8(b)(1)(A) which indirectly protects an employee's right to refrain from concerted activity. Thus the conduct complained of, i.e. improperly causing Plaintiff to be denied employment by an alleged improper application of the union rules with respect to hiring lists, is arguably within the ambit of Section 8 of the NLRA and thus subject to the exclusive jurisdiction of the NLRB.

Under these facts, the point that the union's conduct, if true, would arguably fall within § 8 results in more than just a mechanical application of the preemption rule. The administration of a hiring hall as an integral part of the employment process under negotiated collective bargaining agreements is an activity that transcends state borders when dealing with seamen as in this case. It is a process that is particularly suited to regulation under the special expertise acquired by the NLRB and one that could be seriously disrupted by the application of different rules of law in the many jurisdictions in which the American Radio Association has offices. The possibility of conflict between state and federal policy is especially evident here where Plaintiff is attempting to effect the labor policy of the American Radio Association and indirectly the employers who are signatory to collective bargaining agreements with them, after having had his claims rejected as without merit by the NLRB. Assumption of jurisdiction in this case by a Louisiana court leads to the possibility that a change in the manner in which men are placed upon the various hiring lists would be required either by court order or by feat of future damage actions in a situation where the NLRB found no such change to be necessary under the policies set forth by Congress in the LMRA.

In this connection, the case of *Farmer v. Carpenters Local 25*, 45 USLW 4263, __ U.S. __ , March 7, 1977, is pertinent. In that case, the plaintiff alleged the tort of intentional infliction of emotional distress as the result of an alleged harrassment campaign by the local union. This campaign allegedly resulted in discrimination against the Plaintiff in referrals from the union hiring hall as well as personal abuse that caused him emotional damages. Here it was found that the state cause of action was designed to protect against the "outrageous conduct" by the union. As such,it was unrelated to the claim of employment discrimination in the sense that the abusive conduct complained of was not a result of the discrimination in employment opportunities. Any relationship between the tort and the discrimination here would be that the outrageous conduct forming an element of the claim would be a result of the abusive nature in which the

employment discrimination was accomplished rather than a function of the discrimination itself.

Because the tort inquiry in *Farmer* would not deal with the manner in which employment discrimination was accomplished but rather with abusive conduct on the part of union agents, the inquiry was deemed sufficiently separate from the area of NLRB jurisdiction so as to allow state proceedings without fear of the conflicts that might develop. The state action would not provide redress against employment procedures as administered by the union but rather would provide damages for the allegedly outrageous actions of union agents. Similarly the NLRB inquiry would not address itself to the issue of this conduct nor would it award damages. Rather it would concern itself with finding whether employment discrimination was practiced and ordering corrective measures if such discrimination were found.

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The Louisiana tort claim alleged by Plaintiff Alateras is not as limited in scope as that in the *Farmer* case. Article 2315 provides that "Every act whatever of man that causes damage to another obligates him by whose fault it happened to repair it." An inquiry under the broad language of 2315 is not limited to a search for abusive or outrageous conduct on the part of the defendants, but rather would be an inquiry into the very nature and operation of the hiring system involved here. The State Court would be reviewing the action taken with respect to Alateras to see if it was a proper application of union rules as they relate to employment referrals. It would be investigating the exact same area as that covered by the NLRB with the possibility that a different result would be arrived at or a different remedy ordered. The State Court would be regulating the administration of the hiring

system without the benefit of the accumulated expertise in the labor field possessed by the NLRB. Thus the possibility for conflict between state law and the national labor policy is great and under the decisions of this court the Louisiana Court of Appeals was correct in finding that jurisdiction over Plaintiff's claim was preempted by the NLRB.

One further possibility that could grant Plaintiff a state court action, but in fact does not on the present facts, is if he had alleged the breach of the union's duty of fair representation. Under *Vaca v. Sipes*, 385 U.S. 925 (1967) there is no justification for preemption in this area since the NLRB had adopted the doctrine from the federal courts and does not possess any particular expertise to review positions taken by a union in contract negotiations or in processing grievances.

The original petition did not allege, nor did the trial court find that there was any breach of contract by an employer that should have been pursued by the defendants here and thus the present case does not involve a breach of any duty to handle grievances. Nor do the facts indicate that the defendants did not act in good faith or in an arbitrary manner since both the opinion of the trial court, which dealt with the merits, and the determination by the NLRB General Counsel found that the Union believed Alateras to have attempted to subvert the Union constitution thus justifying the placing of his name on the Active Beach List instead of the Standby List as he had requested. And finally there is no allegation that the Union failed to properly represent Alateras when it negotiated the hiring system now in effect. Therefore the exception to the preemption doctrine represented by fair representation suits is inapplicable to save

Plaintiff's litigation since the facts as found and as alleged do not indicate any breach of the duty of fair representation.

One final point that was addressed in the Petition for Certiorari is the issue of equity in the present system of the NLRB in cases where it exercises exclusive jurisdiction such as this one. If a Regional Director finds as a result of his office's thorough investigation that there is insufficient evidence to substantiate a charge he may refuse to issue a complaint. In his investigation the charging party has an opportunity to present his evidence, though admittedly not in the formal setting of a courtroom. Here Alateras had that opportunity in the New Orleans office of the NLRB, the same city he chose as a home town tribunal for the tort claim he asserted in State Court. His appeal to the General Counsel in Washington from an adverse decision by the Regional Director is not as expensive and exhaustive as asserted in the Petition for Certiorari since the main additional expense involved in an appeal to Washington, as opposed to an appeal in a local forum, is postage.

Additionally, Alateras is not without remedy if the NLRB determines not to issue a complaint based upon his charge. There are internal union appeal procedures that can afford the desired relief if they are timely initiated. Thus there are two available appeals procedures that would mitigate against altering the policy behind the preemption doctrine on any equity grounds. The danger of conflict with federal labor policy would seem to outweigh any inequity caused by denial of a state court forum to an individual in Alateras' position.

CONCLUSION

Because the decision of the Louisiana Court of Appeals for the Fourth Circuit is in accordance with the decisions of the Supreme Court, no Writ of Certiorari should issue in this case.

Respectfully submitted,

C. PAUL BARKER
DODD, BARKER, BOUDREAUX,
LAMY & GARDNER
1400 Richards Building
837 Gravier Street
New Orleans, Louisiana 70112
Counsel for Respondent

OF COUNSEL:

Edwin A. Steinberg
99 Park Avenue
New York, New York 10016

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 1977, three copies of the Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to E. Howard McCaleb,III, Esq., 536 First N.B.C. Building, New Orleans, Louisiana, Counsel for the Petitioner. I further certify that all parties required to be served have been served.

C. Paul Barker

APPENDIX A
PETITION FOR INTERFERENCE WITH EMPLOYMENT

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. DIVISION: DOCKET:

ANTHONY G. ALATERAS

VS.

FLOYD J. K. HEPTING and
AMERICAN RADIO ASSOCIATION AFL-CIO

FILED: March 28, 1972 DY. CLK:

PETITION FOR INTERFERENCE WITH EMPLOYMENT
($750,000.00)

Petition of Anthony G. Alateras, domiciled in this Parish, with respect shows:

I

The defendant, Floyd J. K. Hepting, is domiciled in the Parish of Jefferson, while the defendant, American Radio Association AFL-CIO (hereinafter called the Union) is a Union affiliated with the American Federation of Labor and Congress of Industrial Organizations, with its national office located in New York, New York, with a branch office located in this Parish; has been and is doing business within the State. Both defendants are justly indebted to your petitioner

in solido in the sum of $750,000.00 with interest thereon from date of judicial demand and the cost of these proceedings, the following, to-wit:

II

Petitioner was employed by Pacific Far East Line Steamship Company on February 12, 1972, and assigned to the S/S JAPAN BEAR. Petitioner was temporarily layed off from his employment, and defendant Hepting refused to place plaintiff upon the Stand By List, as it was his duty to do under the union rules; for defendant Hepting stated that petitioner was in collusion with the employer, and maliciously caused the National Council of the Union to relinquish petitioner's assignment and place him at the bottom of the Active Beach List.

III

On March 3, 1972, Mr. Leonard Johnson was assigned to petitioner's employment with the Pacific Far East Steamship Company, even though the defendant Union, by its officers, agents, and representatives, knew that it had caused Pacific Far East Lines to refuse to employ plaintiff by preventing him from being placed upon the Standby List, removing him from his official work assignment, and placing him at the bottom of the assignment list, for arbitrary, irrelevant, invidious, and discriminatory reasons.

IV

Plaintiff itemizes his damages which he sustained as the result of the defendants' malicious interference with his employment, as follows:

Loss of Wages	$700,000.00
Mental anguish and distress	50,000.00
Total	$ 750,000.00

WHEREFORE, plaintiff prays for judgment against Floyd J. K. Hepting and American Radio Association AFL-CIO, in solido, for $750,000.00, with legal interest thereon from date of judicial demand until paid and the cost of these proceedings.

s/ E. Howard McCaleb,III
E. HOWARD MCCALEB,III
Attorney for Plaintiff
627 NBC Bldg. 523-1953
New Orleans 70112

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, personally appeared Anthony G. Alateras, who deposed that he is the plaintiff in the above entitled cause, that he has read the petition; and that all of the facts alleged therein are true and correct.

s/ Anthony G. Alateras
ANTHONY G. ALATERAS

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 27th DAY OF MARCH, 1972

s/ E. Howard McCaleb, III
NOTARY PUBLIC

A TRUE COPY
S/ M. O. Kuelec
Deputy Clerk, Civil District Court
Parish of Orleans
State of Louisiana

Please serve:
(1) American Radio Association AFL-CIO
room 207 - 270 Madison Avenue
New York, New York
Through Secretary of State

(2) Floyd J. K. Hepting
Room 413 - Perdido Building
822 Perdido Street
New Orleans, La.

APPENDIX B
LETTER DATED APRIL 28, 1972 FROM NLRB to
ANTHONY G. ALATERAS

NATIONAL LABOR RELATIONS BOARD
REGION 15
T6024 Federal Building (Loyola)
701 Loyola Avenue, New Orleans, Louisiana 70113
Telephone 527 - 6396

April 28, 1972

Re: American Radio Association,
AFL-CIO (Pacific Far East
Lines, San Francisco, California)
Case No. 15-CB-1283

Mr. Anthony G. Alateras
c/o Mr. James Koss
300 Pecore Street
Houston, Texas 77009

Dear Mr. Alateras:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that the evidence is insufficient to warrant further proceedings. I am, therefore, refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National

Labor Relations Board, Washington, D.C. 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on May 11, 1972. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

Louis V. Baldovin, Jr.
Acting Regional Director

CERTIFIED MAIL
cc: (See page 2)

cc: Edwin A. Steinberg, Esq.
90 Park Avenue
New York, New York 10016

cc: E. Howard McCaleb III, Esq.
627 National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

cc: American Radio Association, AFL-CIO
Room 413 Perdido Building
822 Perdido Street
New Orleans, Louisiana 70112

cc: Pacific Far East Lines
Pier 29
San Francisco, California 94111

APPENDIX C

LETTER FROM NATIONAL LABOR RELATIONS BOARD TO ANTHONY G. ALATERAS

NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
Washington, D.C. 20570

June 29, 1972

Re: American Radio Association, AFL-CIO (Pacific Far East Lines, San Francisco, California)
Case No. 15-CB-1283

Mr. Anthony G. Alateras
300 Pecore Street - Apt. 30
Houston, Texas 77009

Dear Mr. Alateras:

Your appeal in the above matter has been duly considered.

The appeal is denied. The evidence failed to indicated that the Union's refusal to permit you to register on the Standby list was for any reason other than its belief that you and the Pacific Far East Lines were trying to circumvent the hiring hall procedures in order to insure your being hired by the Company. In the absence of a showing that the Union was motivated by any unlawful intent, its

actions in this regard were not deemed violative of the Act.

Very truly yours,

Peter G. Nash
General Counsel

By: s/ Irving M. Herman
Irving M. Herman
Director, Office of Appeals

cc: Director, Region 15
Edwin A. Steinberg, Esq., 90 Park Avenue, New York, New York 10016
E. Howard McCaleb, III, Esq., 627 Natl. Bank of Commerce Building, New Orleans, Louisiana 70112
American Radio Association, AFL-CIO, Room 413, Perdido Building, 822 Perdido Street, New Orleans, Louisiana 70112
Pacific Far East Lines, Pier 29, San Francisco, California 94111

CERTIFIED MAIL